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Recommended Citation

Brief of Respondent, *Muhlback v. Hertig*, No. 9959 (Utah Supreme Court, 1963).
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APR 16 1964
**IN THE SUPREME COURT OF
THE STATE OF UTAH** LIBRARY

HARRY S. MUHLBACH,
Plaintiff-Respondent,

—vs.—

No. 9959

W. LYNN HERTIG,
Defendant-Appellant.

ED
OCT 14 1963

RESPONDENT'S BRIEF

Clerk, Supreme Court, Utah

**Appeal from the Judgment of the Third District
Court for Salt Lake County,
Honorable Merrill C. Faux, Judge**

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IN THE SUPREME COURT OF THE STATE OF UTAH

HARRY S. MUHLBACH,

Plaintiff-Respondent,

—vs.—

W. LYNN HERTIG,

Defendant-Appellant.

No. 9959

RESPONDENT'S BRIEF

POINT I.

THE LOWER COURT DID NOT COMMIT ERROR IN INSTRUCTING ON THE SUDDEN EMERGENCY DOCTRINE.

POINT II.

THE COURT DID NOT ERR IN FAILING TO DEFINE IN THE INSTRUCTIONS WHAT WAS AN IMMEDIATE HAZARD.

POINT III.

THE LOWER COURT PROPERLY INSTRUCTED THE JURY THAT EACH DRIVER HAD A DUTY TO KEEP A LOOKOUT.

POINT IV.

THE TRIAL COURT VERY PROPERLY REFUSED TO DIRECT A VERDICT FOR DEFENDANT; AND THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

STATEMENT OF FACTS

Respondents are not entirely in agreement with the statement of facts set forth in appellant's brief.

The incident giving rise to this legal action occurred on March 15, 1962 (R. 147, at about 6:30 o'clock p.m. (R. 150, R. 126).

The incident occurred at a time when it was still daylight, and visibility was good (R. 150). The weather was clear (R. 150).

At the intersection of 13th East and the Cottonwood Diagonal, the roads are both asphalt-based roads. For all practical purposes, at the point of intersection, they are level and straight (R. 129). Immediately to the south of the intersection there is a stop sign on 13th East facing south, directing traffic proceeding north on 13th East to stop (R. 129). The speed limit on the Cottonwood Diagonal at the time of the incident was fifty miles per hour (R. 131).

At the point of intersection of the two streets, 13th East runs north and south (see Exhibits 1P and 9B). The Cottonwood Diagonal runs southwest-northeast at its intersection with 13th East (see Exhibits 1P and 9D).

Mr. Muhlbach was proceeding northwest on the Cottonwood Diagonal (R. 147). As he approached the intersection of the Cottonwood Diagonal and 13th East, he saw the light colored Oldsmobile being driven by the defendant, Mr. Hertig (R. 148). Mr. Muhlbach first saw Mr. Hertig's car when it was some two to three hundred feet south of the stop sign on 13th East (R. 166).

As Mr. Muhlbach was approaching the intersection, he was proceeding down the Cottonwood Diagonal at about 40 miles per hour, but as he neared the intersection, he slowed to about thirty-five to thirty-six miles per hour (R. 160 and R. 166).

Mr. Hertig appeared to either completely or nearly stop for the stop sign (R. 162). Mr. Muhlbach thought Mr. Hertig would remain stopped at the stop sign until Mr. Muhlbach had passed (R. 149, 166). At any rate, Mr. Muhlbach blasted his large air horn to give additional warning to Mr. Hertig (R. 149), but Mr. Hertig suddenly gave a burst of speed and shot right in front of Mr. Muhlbach (R.149).

Mr. Jed K. McMillan, a witness who was proceeding southeast on the Cottonwood Diagonal, noticed that the automobile being driven by Mr. Hertig appeared to be proceeding straight north on 13th East, but following the blast of the air horn, made a hasty left turn down the Diagonal, and that the Hertig car was under such heavy acceleration that it appeared to "fishtail" down the Diagonal (R. 270, 271).

Mr. Muhlbach came so close to Mr. Hertig that he thought he had hit him; in fact, he was so close that Mr. Mulbach couldn't see the top of Mr. Hertig's automobile because the top of Mr. Muhlbach's fender obstructed his view (R. 168). Mr. Muhlbach then veered his truck to the right in order to avoid a collision with the Hertig vehicle and then rolled over and slid down into the ditch, damaging his vehicle (R. 150).

Mr. Hertig then proceeded down the Diagonal at a speed of about fifty miles per hour (R. 187) until an individual stopped Mr. Hertig and said that a truck had just about run into the rear end of his car and that he had better go back (R. 185).

Mr. Hertig admits that he never did see Mr. Muhlbach's truck until he had been returned to the scene of the incident and saw it in the ditch (R. 185).

ARGUMENT

POINT I.

THE LOWER COURT DID NOT COMMIT ERROR IN INSTRUCTING ON THE SUDDEN EMERGENCY DOCTRINE.

The Court presented the doctrine of sudden emergency to the jury in instruction No. 16 (R. 94), as follows:

“One who, in a sudden emergency, acts according to his best judgment, or who, because of lack of time to form a judgment, omits to act in the most judicious manner, is not chargeable with contributory negligence, provided he exercises in the emergency the care of a reasonable prudent individual under like circumstances.

“In such a situation, his duty is to exercise only the degree of care which an ordinary prudent person would exercise under the same or similar circumstances. If, at that moment, he exercises such care, he does all the law requires of him, even though, in the light of after-events, it might appear that a different choice and manner of action, would have been better and safer.”

This type of instruction was approved in a Utah case entitled, *Redd v. Airway Motor Coach Lines* (1943) 104 U.9, 137 P.2d 374, 377.

The law is clear that the plaintiff is not burdened with the duty of requesting the Court to give instructions which set up defenses claimed by the defendant.

Plaintiff, in proposing an instruction on his theory of the case, is not required to also propose instructions setting out all of the possible defenses thereto. If defendant desires instruction on defenses to any ground which would allow plaintiff to recover, he should propose them.

Defendant did not request any instructions whatsoever on the sudden emergency doctrine.

Defendant cites in his brief the California case of *Jones v. Henrick*, 49 Cal. App. 2d 702, 122 P.2d 304; however, this case specifically points out that in that case, the complaining party requested the Court to place a limitation on the instruction given by the Court.

Instruction No. 16 very succinctly states what degree of care is to be expected from an individual acting

in emergency. It left open to the jury the question of whether or not an emergency, in fact, existed.

While the appellant contends that the giving of this instruction took the question of contributory negligence from the jury, it should be pointed out that the jury was very carefully instructed that none of the instructions given should be considered alone, and that they should all be considered with reference to one another. The entire charge given to the jury very carefully and accurately placed the question of contributory negligence before the jury.

Instruction No. 28 as given by the Court (R. 106) states:

“These instructions, though numbered separately, are to be considered and construed by you as one connected whole. Each instruction should be read and understood with reference to and as a part of the entire charge and not as though one instruction separately was intended to present the whole law of the case on any particular point. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions, as a whole, and to regard each in the light of all the others.”

Instructions No. 13 (R. 91), 14 (R. 92) and 15 (R. 93) clearly set forth contributory negligence as a defense.

It is clear the trial court correctly instructed the jury as to the law applicable to the case.

The instruction on sudden emergency left it up to the jury to determine whether or not a sudden emergency in fact, existed. The instruction deals only with the sequence of events occurring after an emergency comes into existence.

If the jury were to have found that the plaintiff was negligent prior to the existence of an emergency, by virtue of the other instructions contained in the charge, they were instructed that if such negligence proximately contributed to the plaintiff's injury, that they should find the issue in favor of the defendant and against the plaintiff and return a verdict, "No cause of action."

POINT II.

THE COURT DID NOT ERR IN FAILING TO DEFINE IN THE INSTRUCTIONS WHAT WAS AN IMMEDIATE HAZARD.

It should be noted that since 1961, the laws with respect to rights of way between vehicles while one is making a left turn, between vehicles entering open intersections, and vehicles entering through highways from stop signs, have been amended. Prior to recent amendments, in the case of vehicles entering open intersections at right angles to one another, our laws were such that we actually created a race between the two vehicles in that the one first entering the intersection had the right of way and was deemed the favored driver. 41-6-72 Utah Code Annotated 1953 was amended to read that when vehicles entered an intersection at right angles to

one another and at *approximately* (italics ours) the same time, the vehicle to the left shall yield the right of way to the vehicle on the right.

We had a situation prior to 1961, by virtue of 41-6-73 Utah Code Annotated in which if two vehicles were proceeding in opposite directions and one intended to make a left turn, the one so intending to make a left turn should have yielded the right of way to any vehicle approaching from the opposite direction which was within the intersection or so close as to constitute an immediate hazard. Apparently this had been interpreted to mean an immediate hazard at the time the driver intending to make a left turn commenced his left turn. In 1961, this statute was amended by adding, "during the time when such driver is moving within the intersection." The effect of this amendment is to prohibit the left turn if an immediate hazard would be created at any time while the driver making a left turn was in the intersection.

Likewise, in 1961 the law concerning entering a through highway from a stop sign was amended to make right-of-way more definite; in 1961 the legislature enacted 41-6-74.10, sub-section (b) of which provides:

"Vehicle entering stop or yield intersection. Except when directed to proceed by a police officer or traffic-control signal, every driver of a vehicle approaching a stop intersection indicated by a stop sign shall stop as required by section 41-6-99 and after having stopped shall yield the right-of-way to any vehicle which has entered the intersection from another highway or which is

approaching so closely on another highway as to constitute an immediate hazard *during the time when such driver is moving across or within the intersection.*" (italics ours)

The experience of several decades of high-speed motor travel has demanded laws be more definite in the area of right of way. It is obvious that modern high speed travel on freeway-type highways would be impossible if drivers approaching such highways could enter thereon and loiter across the highway while approaching traffic was proceeding at high rates of speed and in possibly as many as six lanes of traffic.

The 1961 Legislature wisely added the phrase to our laws dealing with entering through-highways from side roads controlled by stop signs to include the phrase, "during the time when such driver is moving across or within the intersection."

Prior to the 1961 amendment, the point of time used to determine whether or not other vehicles approaching constituted an immediate hazard was apparent the instant the driver entering from the side road was entering the intersection. The amendment changed the period of time for determination of what constituted an immediate hazard to include all of the time during which the driver entering the through-highway was moving across or within the intersection.

It should be noted that the cases cited by appellant in his brief under Point II were decided prior to 1961,

and in light of recent amendments, are no longer applicable.

It should also be noticed from the defendant's requested instructions (R. 51-77) that defendant failed to request an appropriate instruction dealing with the definition of "immediate hazard."

The evidence showed that when Mr. Hertig had straightened out his automobile after making his left turn to proceed northwest on the Cottonwood Diagonal, the truck belonging to the plaintiff was at his side. The testimony of Mr. Hertig, which appears in the record at pages 225 and 226 clearly indicates this. The question was asked:

"So, it is quite probable, is it not, that, at the time you looked in your rear view mirror, when you had straightened out, that the reason you didn't see the truck was because it would be more or less to your side?"

Answer: "Yes, I would say so; at least, not directly behind me."

It is evident that when Mr. Hertig was commencing his left turn, the plaintiff had taken evasive action and swerved to the right so that while Mr. Hertig was still in the intersection making his left-hand turn, the plaintiff was to the right side of Mr. Hertig in the intersection.

It is obvious that Mr. Muhlbach's truck was so close to the intersection at the time Mr. Hertig commenced proceeding through the intersection that there was an

immediate hazard. The question of whether or not Mr. Muhlbach's truck constituted an immediate hazard is a question of fact, and not necessarily a question of law.

Appellant seems to lay great stress on the case of *Richards v. Anderson* (1959) 9 U.2d 17, 337 P.2d 59. First, it is to be remembered that this case was decided prior to recent amendments above referred to and is no longer applicable; and second, that in the *Richards v. Anderson*, case, the vehicle entering from the stopsign was proceeding at what may be regarded as an unusually slow speed.

Prior to the recent amendment, the point of time for determining whether an immediate hazard would exist was apparently the instant a driver entered a through-highway from a stopsign. In light of recent amendments, as the time for determining whether an immediate hazard exists includes all of the time the driver entering from the stop sign is within the intersection, it is suggested that the *Richards v. Anderson* case is no longer controlling.

It is also important to note that in the *Richards v. Anderson* case, the vehicle entering the through highway from the stop sign was proceeding at an average speed of about five miles per hour. In the case now pending before the Supreme Court on appeal, the individual entering the through highway from the stop sign did so at extreme acceleration (R. 271).

Where one driver enters a through highway from a stop sign under heavy acceleration and forces another

driver on the through highway off the roadway, it does not seem that a finely-detailed instruction on what constitutes an immediate hazard would serve any useful purpose. The words, "immediate hazard" are not above the comprehension of layman.

POINT III.

THE LOWER COURT PROPERLY INSTRUCTED THE JURY THAT EACH DRIVER HAD A DUTY TO KEEP A LOOKOUT.

Appellant urges under Point III of his brief that the lower court erred in failing to instruct the jury that each driver had a duty to keep a lookout and that it was negligence to fail to see what was plain to be seen. This statement by appellant is not entirely correct. The court, in instruction 13 (R. 91), instructed the jury as follows.

"It was the duty of Harry S. Muhlbach to use reasonable care under the circumstances in driving his truck to avoid danger to himself and others *and to observe and to be aware of the condition of the highway, the traffic thereon, and other existing conditions; in that regard, he was obliged to observe detail in respect to:*

"(A) *Keep a proper lookout for other vehicles or other conditions reasonably to be anticipated.* * * *" (italics ours)

In a following instruction given by the court, instruction 15 (R. 93), the jury was instructed as follows:

"Before contributory negligence would preclude plaintiff's recovery, you must find from a

preponderance of the evidence that each of the following propositions are true:

“Proposition No. One:

“That the plaintiff was negligent in the operation of his truck just before the alleged incident in one or more of the following particulars:

“(a) ***

“(b) ***

“(c) That plaintiff was maintaining a lookout; or ***.”

Throughout the instructions, the jury was adequately instructed that negligence consisted of doing or failing to do what a reasonable, prudent person would not have or would have done under the circumstances. It is obvious that under the instructions as given, the jury would have had little trouble in ascertaining that failure to see what was readily available to be seen constituted negligence.

Defendant's requested instruction 16 was properly refused in that it does not state the law. It fails to take into account the right of an individual using an arterial highway to assume reasonable and lawful conduct on the part of others until such time as something would occur to place him on notice to the contrary.

POINT IV.

THE TRIAL COURT VERY PROPERLY REFUSED TO DIRECT A VERDICT FOR DEFENDANT; AND THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERICT.

Defendant seems to completely overlook the fact that plaintiff had the right to rely on safe and reasonable conduct on the part of others using the highway until such time as, in the exercise of due care, he noticed or should have noticed something to the contrary.

Mr. Hertig was obliged to stop at the stop sign and yield the right of way to plaintiff. 47-6-74.10 (b), Utah Code Annotated 1953, provides:

“Vehicle entering stop or yield intersection. Except when directed to proceed by a police officer or traffic control signal, every driver of a vehicle approaching a stop intersection indicated by a stop sign shall stop as required by Section 41-6-99, and after having stopped, shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on another highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection.”

Mr. Hertig was obliged to stop and yield the right of way to plaintiff, and should not have entered the intersection while the plaintiff's vehicle or any other vehicles were approaching so closely as to constitute an immediate hazard during the time Mr. Hertig's vehicle was moving across or within the intersection.

Mr. Muhlbach had the right to rely on the assumption that Mr. Hartig would stop or remain stopped at the stop sign until he observed, or in the exercise of due care should have observed, something to warn him to the contrary.

In both the cases of *Martin v. Stevens*, 1952, 121 U. 484, 243 P.2d 747 and *Peterson v. Nielsen*, 1959, 9 U.2d 302, 343 P.2d 731, the Supreme Court of the State of Utah has clearly pronounced the law with respect to the degree an individual is entitled to rely on safe and reasonable conduct of others, especially at intersections where one driver is favored with the right of way.

In the case of *Peterson v. Nielson*, plaintiff's vehicle was traveling down a highway at about sixty miles per hour. Defendant approached the highway from a side road which apparently intersected the highway at a 90-degree angle. As he approached, he stopped at a stop sign, and then without looking and observing plaintiff's car, proceeded out onto the highway. A collision resulted.

In the *Peterson v. Nielson* case, the trial court dismissed plaintiff's complaint, finding that plaintiff was traveling at a speed greater than reasonable and prudent, that she failed to sound her horn, and that she failed to observe the defendant had his attention focused on another automobile. The Supreme Court of the State of Utah reversed the trial court and very succinctly stated the law in the State of Utah, as follows :

“Having observed the defendant stop as he was about to enter the highway, at any time after plaintiff was close enough to constitute an immediate hazard to him, she could assume that he would remain stopped and accord her the right of way. She could continue to rely on that assumption until she observed, or should have ob-

served, something to warn her to the contrary. It may be true that a high degree of caution would have impelled her to apprehend that the defendant might suddenly dart onto the highway in front of her. But she was not obliged to do so. While extraordinary caution is commendable, it is not required as a standard of conduct. The concept of contributory negligence must not be so extended as to require one to drive under the apprehension that the other driver will be guilty of a sudden burst of negligence. If all drivers were required to be that cautious and await upon each other, it would seriously impede the movement of traffic and make driving upon modern high speed arterial highways quite impractical.

“The problem then is: at the instant defendant started up from his stopped position, was the plaintiff far enough to the north that she could have avoided the collision?”

In the case now pending before the Supreme Court of the State of Utah on appeal, it is to be remembered that the plaintiff, Mr. Muhlbach, anticipated Mr. Hertig would remain stopped at the stop sign until Mr. Muhlbach had proceeded past the intersection (R. 149-166). When Mr. Muhlbach blasted his air horn, the defendant suddenly and unexpectedly shot out in front of plaintiff, forcing him off the highway (R. 149).

Appellant seems to argue that plaintiff was contributorily negligent for having failed to see defendant in time to avoid the situation which forced him off the roadway; however, the real question is whether or not a reasonable, prudent person would have been able to

determine defendant was not going to stop or remain stopped at the stop sign in enough time so that said reasonable, prudent person could have taken evasive action and avoided a collision and being forced off the highway. Defendant's proof was lacking in this regard, and plaintiff contends that in light of defendant's sudden burst of speed, a reasonable, prudent person would not have been able to avoid being forced off the highway, as was the plaintiff, Mr. Muhlbach.

Appellant attempts to prove contributory negligence on the part of the plaintiff through the use of a statement given by plaintiff to the investigating officer following the roll-over. During the investigation following the roll-over, Officer Keith Iba asked Mr. Muhlbach "how many feet it was he first noticed danger of the accident" (R. 180). "He (Muhlbach) told me it was thirty feet away" (R. 180).

It should be noted that Mr. Muhlbach did not say the car of Mr. Hertig was thirty feet away when he first noticed it, but his statement indicates it was thirty feet away when danger of the accident became apparent.

This statement should be reviewed in light of existing circumstances.

During the trial, defendant introduced a statement taken from Mr. Jed K. McMillan, an independent witness. This exhibit was designated, "Exhibit 11D". In the exhibit, Mr. McMillan states what he observed when he arrived at the scene of the incident, as follows:

“The driver was pulling himself up out of the truck. He was in a state of shock. He did not say anything, as he was in a daze. I sat him to the side of the road.”

It is rather apparent that Mr. Muhlbach was severally shaken up as a result of the roll-over.

When you consider that the veer marks left by plaintiff's truck commenced some thirteen feet southeast of the intersection (R. 128) and when you consider that at thirty-five miles per hour, the plaintiff would travel over thirty-eight feet during a three-quarters of a second reaction time, it is obvious from the physical evidence that plaintiff did observe the danger when he was more than thirty feet away from the defendant's automobile.

It is folly to assume that an individual suddenly confronted with an apparent collision, or the danger thereof, would very carefully calculate how many feet away from various objects he was at that point.

At best, all that can be said of the statement concerning the thirty feet so often referred to is that it was a guess given by an individual who had been severally shaken up as a result of being jostled about in a large truck which rolled over and which was not apparently correct in view of physical evidence found at the scene of the collision.

The Supreme Court of the State of Utah very wisely pointed out in the case of *Gittens v. Lundberg* (1955) 3 U.2d 392, 284 P.2d 1115:

“It is not a prerequisite to credibility that a witness be entirely accurate with respect to every detail of his testimony. If it were so, human frailties are such that it would be seldom that a witness who testified to any extent could be believed. The jury may evaluate the testimony of witnesses and accept those parts which they deem credible, even though there be some inconsistencies.”

Sergeant Pitcher's testimony was helpful in some areas in that he was able to explain to the jury what a reaction time is and was able to explain several other basic factors. However, beyond that, his testimony was of little help. Certainly the testimony of Sergeant Pitcher did not establish any facts which could be relied upon on the real and important questions involved in this lawsuit.

While defendant Hertig admitted that he accelerated to the speed of fifty miles per hour (R. 187), at which speed he proceeded down the Cottonwood Diagonal, the calculations upon which appellant relies are based upon an average speed from the intersection to a red mark drawn on an exhibit of ten miles per hour. As there never was an accurate calibration of defendant's speed to that point, and in view of the fact that the witness, Jed K. McMillan, noticed defendant's vehicle “fishtail” under heavy acceleration (R. 270-271), the figure of ten miles per hour is, in fact, unrealistic.

A red mark was drawn on Exhibit 9D by defendant Hertig as his approximation of where he was when he commenced making a left turn. There was no physical

evidence at the scene of the collision which would indicate exactly where this point was. The mere fact that this red mark was placed on a scale drawing does not take it out of the realm of speculation. As it appeared to both Harry Muhlbach and the independent witness, Mr. Jed K. McMillan, that the defendant, Mr. Hertig, was going to proceed north on 13th East (R. 149, R. 270, R. 271) but made a very hurried left turn upon hearing the blast of the air horn, the great weight of the evidence would tend to indicate that Mr. Hertig did not place the red mark on the drawing where it should have been placed.

Based upon an unknown, that being the average speed of defendant Hertig from the stop sign into the distance to the red mark, Sergeant Pitcher attempted to intersection, and another unknown, the hypothetical establish how far away from the intersection the plaintiff was when Mr. Hertig left the stop sign. In addition, Sergeant Pitcher, by his own admission, did not take into consideration the factors of judgment time and break lag time, which he admits should have been taken into consideration (R. 255, 261, 262).

Such flimsy evidence was clearly not a basis for setting aside the verdict of the jury, nor could it reasonably form a basis for a directed verdict or new trial.

Appellant seems to completely overlook an individual's right to rely upon the reasonable conduct of others until something happens which should place him on notice to the contrary. If the law placed a burden upon drivers

using arterial highways to anticipate negligent, reckless, or other unlawful conduct on the part of others, there is no question but what the flow of traffic would be seriously impeded. If a driver using an arterial highway were under a duty to slam on his brakes or slow down suddenly when he saw a driver approaching the highway from a side road controlled by a stop sign, the danger of rear end collision would greatly outweigh any advantage to be gained therefrom.

Questions of whether or not plaintiff was negligent in any respect, whether his negligence, if any, constituted a factor which proximately contributed to the roll-over, the question of the extent to which he could rely on reasonable conduct on the part of others until something warned him to the contrary, are all jury questions. The case of *Martin v. Stephens* (1952) 121 U. 484, 243 P.2d 747, clearly states these matters to be questions for the jury.

It is elementary that unless it could be said that reasonable minds could not differ on a proposition, it should be left to jury. If in this case there are any questions upon which reasonable minds could not differ, they should have been resolved in favor of the plaintiff and against the defendant. If we are to say that anyone was negligent as a matter of law, it can only be said that the defendant was negligent as a matter of law for failing to have observed plaintiff's truck as it proceeded towards and entered the intersection. It could only be said that defendant was negligent as a matter of law for

failing to stop or remain stopped at the stop sign and for having failed to yield the right of way to the plaintiff.

In any event, the jury decided the issues in favor of the plaintiff and against the defendant under proper instruction from the Court.

CONCLUSION

IN CONCLUSION, THE JUDGMENT IN THE LOWER COURT IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANT SHOULD BE AFFIRMED, AND PLAINTIFF-RESPONDENT — SHOULD BE AWARDED COSTS.

Respectfully submitted,

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